

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

)
In Re: Levaquin Products)
Liability Litigation,) File No. 08-md-1943
) (JRT/AJB)
)
)
) Minneapolis, Minnesota
) September 14, 2011
) 1:47 P.M.
)

BEFORE THE **HONORABLE JOHN R. TUNHEIM**
UNITED STATES DISTRICT COURT JUDGE
(STATUS CONFERENCE)

APPEARANCES

For the Plaintiff: **RONALD S. GOLDSER, ESQ.**
DAVID CIALKOWSKI, ESQ.

Via Phone: **LEWIS J. SAUL, ESQ.**
KEVIN FITZGERALD, ESQ.
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ERIC TERRY, ESQ.
MATTHEW ANDERSON, ESQ.
ELLIOT OLSEN, ESQ.

For the Defendants: **JOHN DAMES, ESQ.**
JAMES IRWIN, ESQ.
TRACY J. VAN STEENBURGH, ESQ.

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Proceedings recorded by mechanical stenography;
transcript produced by computer.

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1 1:47 P.M.

2 (In open court.)

3
4 THE COURT: You may be seated. Good afternoon,
5 everyone. This is multi district litigation number
6 08-1943, In Re: Levaquin Products Liability Litigation.
7 We have a number of people participating by telephone
8 today, which I appreciate.

9 Let's go through the appearances for the record
10 starting with the plaintiffs.

11 MR. SAUL: Yes.

12 THE COURT: Go ahead.

13 MR. SAUL: Good afternoon, Your Honor. Lewis
14 Saul for plaintiffs.

15 MR. FITZGERALD: Good afternoon, Your Honor.
16 Kevin Fitzgerald for plaintiffs.

17 THE COURT: Okay. Mr. Goldser?

18 MR. GOLDSER: Good afternoon, Your Honor. Ron
19 Goldser in the courtroom for plaintiffs.

20 MR. CIALKOWSKI: Good afternoon, Your Honor.
21 Dave Cialkowski.

22 THE COURT: Okay. And for the defendants in the
23 courtroom?

24 MS. VAN STEENBURGH: Tracy Van Steenburgh, Your
25 Honor, for the defendants.

1 MR. IRWIN: And Jim Irwin for defendants.

2 MR. DAMES: And John Dames, Your Honor. I was
3 disappointed that Lewis wasn't here.

4 THE COURT: Well, we've got Lewis by telephone.
5 Who else is on the telephone?

6 MR. RASMUSSEN: Kristian Rasmussen for
7 plaintiffs.

8 THE COURT: Okay.

9 MR. TERRY: Eric Terry for plaintiffs.

10 MS. REARDON: Kelly Reardon for plaintiffs.

11 MR. OLSEN: Elliot Olsen for plaintiffs.

12 MR. ANDERSON: Matthew Anderson for plaintiffs.

13 MS. REARDON: I'm sorry. Kelly Reardon for
14 plaintiffs.

15 MR. ANDERSON: And Matthew Anderson for
16 plaintiffs.

17 THE COURT: Okay. Anybody else?

18 MS. PRICE: Diane Price for plaintiffs.

19 THE COURT: Okay. Very well. We have an agenda
20 today, an amended joint status conference agenda. I
21 apologize for changing our date several weeks ago, but I am
22 glad that we are all here today, and thank you for coming.

23 Mr. Goldser.

24 MR. GOLDSER: Thank you, Your Honor. First
25 before we begin, on behalf of everyone I'm sure, let us

1 offer our condolences to you on the loss of your mother.

2 THE COURT: Thank you. I appreciate that.

3 MR. GOLDSER: Mr. Dames usually reports on the
4 current count of federal and state cases.

5 MR. DAMES: Why not?

6 MR. GOLDSER: Might as well give him his 15
7 seconds of fame.

8 MR. DAMES: That's it. Your Honor, the total
9 number of MDL cases are now at 1461. This is as of 9/12.
10 The pending cases are 1423, and there are six that are
11 going to be transferred, and the federal cases that have
12 been, the number that have been dismissed are 38.

13 THE COURT: Okay.

14 MR. DAMES: The state court cases, other state
15 court cases are 51, and this is not the New Jersey now. I
16 will get to those. 51 cases pending, and 14 have been
17 dismissed, other state court cases.

18 In New Jersey, and I'm going to take for this
19 purpose the Court's count, the New Jersey Court's count,
20 it's 1900 cases, and dismissals in New Jersey, there have
21 been 86. A significant number of that 86 includes
22 dismissals with prejudice.

23 THE COURT: Okay. Very well. Thank you,
24 Mr. Dames.

25 MR. GOLDSER: Your Honor, as I think you know,

1 item 2, federal/state coordination, the New Jersey trial
2 has begun. Opening statements started the day after Labor
3 Day. So far they have gotten through a number of
4 witnesses, Roger Dai, Chuen Yee, David Grewcock.
5 Mr. DeStefanis appeared live, Dr. Kahn. One of the sales
6 reps, Dr. Smith appeared live.

7 Dr. Seeger is on today via videotape. As I
8 understand it, the next few witnesses up are likely to be
9 Dr. Blum, Katherine Reilly-Gauvin and Dr. Bisson. I don't
10 know that there is an end date yet in sight for that trial.

11 In Illinois, I don't have an absolute update, but
12 from a couple of weeks ago in talking to Mr. Carey, who is
13 heavily involved in the Illinois cases, individual
14 plaintiff discovery has been going on. I don't believe a
15 trial case or date has been selected, but I'm getting the
16 impression that they're starting to move in that direction.
17 So we might find ourselves with an Illinois state court
18 trial on the docket in the not too distant future, at least
19 knowing that there will be one and that there will be a
20 date.

21 Other than that --

22 THE COURT: Did you say that you didn't know when
23 the end date might be for the New Jersey trial?

24 MR. GOLDSER: That's correct. I don't. I mean,
25 they're planning mid-October. More precisely than that, I

1 can't say.

2 THE COURT: The trial dates are four days a week,
3 is that right, with limited hours? Is that what they are
4 doing?

5 MR. GOLDSER: Well, actually, Judge Higbee is
6 going half a day on Friday at this point as well.

7 THE COURT: Okay.

8 MR. GOLDSER: The hours have varied, typically
9 starting at 9:00, or at least the jury is instructed to
10 return at 9:00. They haven't started promptly at 9:00 and
11 terminating at 4:30, although yesterday they finished with
12 a witness, and they didn't have another witness to play, so
13 they quit at 1:30 yesterday afternoon.

14 Those are the kinds of days I have been seeing.
15 Interestingly enough, the trial is being videotaped, and
16 it's available online live, and I have been watching it
17 whenever I can rather than having to go out there and
18 participate that way. So I have been able to assist in the
19 New Jersey trial by watching it online.

20 THE COURT: That's interesting.

21 MR. GOLDSER: And it's been very well done. The
22 quality of the transmission is excellent. There will be
23 DVDs of the trial available after the trial.

24 THE COURT: On Netflix?

25 MR. GOLDSER: I'm not sure who would pay whom to

1 watch it, but for our purposes, what is of particular
2 interest to me is that a number of the witnesses who have
3 testified before and will testify again will be on
4 videotape in a trial setting with a judge there ruling on
5 evidentiary issues in front of a jury doing it live and
6 videotaped.

7 You'll recall, of course, we had an issue of that
8 kind at our last trial in front of you with, in the
9 Christensen case, and so as I think going forward, and I'm
10 jumping way ahead of the game, but you know, if we're in a
11 mode way down the road where we're starting to talk about
12 how do we do multiple trials, videotaping witnesses will be
13 an important vehicle, and these videotapes may be very
14 useful in that context, but that's way for another day down
15 the road.

16 THE COURT: So are you participating in the trial
17 yourself, or is Mr. Saul?

18 MR. GOLDSER: We are not taking witnesses.
19 Mr. Alonso from Parker Waichman and Mr. Warywoda from
20 Douglas & London are handling the witnesses on behalf of
21 plaintiffs, just those two.

22 THE COURT: I see. Okay.

23 MR. SAUL: Yes, Your Honor, but members of my
24 firm are there assisting counsel, and we're in touch with
25 them daily.

1 THE COURT: Okay. Thank you, Mr. Saul.

2 Do you have any idea on end date, Mr. Saul?

3 MR. SAUL: No. What Ron said was accurate.

4 Sometime between October 15th and maybe October 21st.

5 THE COURT: Mm-hmm. Okay.

6 MR. GOLDSER: Unless defense has any comments on
7 the New Jersey trial or other states? All right.

8 THE COURT: Mr. Dames, someone from your firm is
9 involved in the trial, is that correct?

10 MR. DAMES: Yes, Susan Sharko is there trying the
11 case along with Christy Jones. I guess I do want to
12 mention on the Illinois cases, I don't know how imminent
13 any trial date is there, Your Honor. It would surprise me
14 if we were even close. The discovery that is being done
15 thus far is not extensive.

16 THE COURT: I see.

17 MR. GOLDSER: Maybe I misspoke, but the selection
18 of a trial date, not the actual trial date, is what I
19 believe to be in the not too distant future, and I wouldn't
20 use the word "imminent" for that, either. My impression
21 is, they are making progress towards getting a trial case
22 and a trial date, but we are not there yet.

23 MR. SAUL: Your Honor -- this is Lewis Saul, Your
24 Honor. When we go through the number of state cases,
25 although Mr. Dames said 51 cases in federal court, there is

1 a number of consolidated ones, and those in Illinois, there
2 is about a thousand consolidated cases there, so the
3 numbers are somewhat higher than appears.

4 THE COURT: So number of plaintiffs are higher
5 than the number of cases?

6 MR. SAUL: Yes.

7 THE COURT: Okay.

8 MR. SAUL: Right. Just one second.

9 Holly?

10 **(Off-the-record discussion.)**

11 THE COURT: Okay. Go ahead, Mr. Goldser.

12 MR. GOLDSER: Thank you. The last item on the
13 agenda for today has to do with the next MDL bellwether
14 trial. It seems to me that the issues break down in terms
15 of date, which case, what do we have to do to get there,
16 and that would include any new generic expert witnesses.
17 I'm not sure which of those you would like to take first.
18 I would think that either date or which case would be first
19 and then what -- how to get there.

20 THE COURT: I have read the letters, which I
21 appreciated receiving. Let's talk about which case first.
22 I mean, what I am anticipating doing here is talking about
23 these matters at the hearing today and giving the matter
24 some slight at least thought and then probably doing a
25 written order very soon so we have things in place, but I

1 do want to talk about the date, too.

2 MR. GOLDSER: Sure. Well, in terms of the cases,
3 we have laid out a lot of the particulars from our
4 perspective on the Johnson, Straka and Olson cases. So you
5 know our generalized feeling. While we have suggested from
6 our perspective that the Straka case is our preferred of
7 the three, we would be very happy with the Johnson case
8 selected as well.

9 We don't believe that Olson is appropriate for
10 lots of the reasons set forth in the letter, multiple
11 doctors, difficult diagnosis, all the rest of those
12 reasons, but since the letters were submitted, we have now
13 taken the deposition of one additional of the doctors,
14 Dr. Kirshbaum, and I venture to say that the Olson case is
15 a lot more like Christensen in terms of prescribing doctor
16 testimony than it is like Schedin.

17 Indeed, if Schedin is on the plaintiff's excess
18 end and Christensen is on the defense success end, the
19 Olson case is if not close to Christensen, it may be beyond
20 Christensen in terms of the likelihood of the defense being
21 able to prevail. After Dr. Kirshbaum's deposition,
22 frankly, I got concerns about whether that case even gets
23 to the jury.

24 As we said in our letter, we don't think that
25 having a case with a prescribing doctor's testimony being

1 the central focus of the case is a particularly important
2 representative. We know that the defense can win a case
3 with a prescribing doctor who says I'm not going to do
4 anything differently. Why do that again?

5 From our perspective, what matters really more
6 than anything at this point is whether the jury in Schedin
7 and their view of damages is low, high, middle, rational or
8 irrational, appropriate or aberrant.

9 And it seems to me that knowing more about how
10 juries react to damages will tell us a lot about values of
11 these cases if at some point the defense is interested in
12 sitting down and figuring out how to value these cases. So
13 having a case that is more likely than not going to get to
14 the question of a number I think is more highly valuable as
15 a bellwether.

16 And to be sure, you know, Ms. Van Steenburgh in
17 her responsive letter says, hey, we're not going to take
18 liability as a given and lay down just because we won
19 Schedin, and I appreciate that. When I see how vigorously
20 the defense was made in Christensen on a number of other
21 issues, and I certainly see how that defense is being made
22 again in New Jersey on those same issues, and perhaps
23 they'll win on those issues.

24 Perhaps that's all the more important reason why
25 the prescribing doctor should be taken out of the mix.

1 Let's find out if there are other issues that the defense
2 can win on, and let's find out if they can't win on those
3 issues, what the value of those damages should be. So we
4 think Olson should not be included for that reason.

5 So then it comes down to Straka versus Johnson,
6 and not a lot to choose from, from our perspective, quite
7 honestly. Straka would be easier to try. He is in his
8 early seventies. He is local. He will be able to come.
9 The issues present surrounding the label are very similar
10 to the issues that we have dealt with already, so hopefully
11 we don't have a lot of evidentiary problems that we have to
12 confront that will be new.

13 Ms. Johnson's case is fall of 2002, prescription
14 and injury. That may very well present some different
15 evidentiary issues about what's admissible and what's not.
16 If we want to confront those, I mean, that would be great.
17 We can try something new and different to confront
18 different issues. My guess is and my feeling is that
19 Straka would be better so that we can answer some of the
20 questions that I have just described a little more easily
21 than Johnson might present.

22 The other thing about Sharon Johnson, her
23 injuries are horrendous. She had bilateral ruptures. On
24 one side, not only did she have surgery, but she had a
25 tendon replacement. Her damages, at least from the medical

1 side of things as I can tell, are at the high end of the
2 range.

3 Would I love to try a verdict and get a, you
4 know, a three billion dollar verdict? Sure. Is that going
5 to make the press? Sure. Is that going to be helpful for
6 figuring out what the values of these cases are for
7 purposes of settlement? No, I don't think so.

8 That's why we think Johnson may not be the best
9 choice. Mr. Straka was bilateral ruptures. He had no
10 surgery. His damages in many respects at least medically
11 will be similar to those of Mr. Schedin, although
12 Mr. Schedin was just the one ankle, and Mr. Straka is both.

13 With Mr. Straka, we'll have local medical doctors
14 except for his prescribing doctor, who is on videotape,
15 locked down. Her testimony is ready to go, and her
16 testimony from my perspective is very solid on the
17 causation question. I don't think that will be an issue,
18 certainly not for the Court, and I would hope not for the
19 jury, although the defense seems to work magic on that
20 issue sometimes by playing their clips, and we'll play our
21 clips in our opening this time and make sure that we beat
22 them to the punch.

23 So we think that Straka is the best choice of the
24 cases for those reasons.

25 THE COURT: Ms. Van Steenburgh?

1 MS. VAN STEENBURGH: Thank you, Your Honor. I'll
2 try not to repeat what is in our letter. I think I would
3 start out by saying, if we're talking about which case, I
4 think both parties agree Johnson is probably not the
5 appropriate case to try. Mr. Goldser has reiterated that
6 for the reasons stated here, and we would agree that was
7 not a representative case.

8 As between Olson and Straka, I do think that this
9 is not about damages. We do think there are issues of
10 liability, and I do think one of the big issues is the
11 prescribing physician, and so it's going to make it
12 difficult to find even representative cases in some ways
13 because you don't know what the prescribing physician is
14 going to say.

15 And so that is a problem, and I don't think we
16 can look at it just in terms of injuries and what the
17 damages might be. It becomes problematic. I think Olson
18 is actually a helpful case, and as I pointed out in my most
19 recent letter, there we have run into in this litigation a
20 practice by physicians of engaging in empiric therapy, and
21 I think we have heard about that in Schedin.

22 We've heard about that in Christensen, and Olson
23 is truly an empiric therapy case where you don't know what
24 the condition or the problem is of the patient, and so you
25 are looking for a broad spectrum antibiotic, and you choose

1 Levaquin, and then there are consequences, whether they're
2 related to Levaquin or not thereafter.

3 So Olson actually presents a decent
4 representation in terms of cases that are out there. Olson
5 would be easy enough. I do admit there are three
6 prescribing physicians, but they were all within a
7 three-day span, so it's not like they're going to be on the
8 stand for a week at a time per the prescribing physician.

9 The injuries are pretty clear with Mr. Olson. He
10 has been treated here in the Twin Cities, so all of the
11 physicians are live, and I think one of the things that we
12 have learned from the Christensen case, it's always nicer
13 to have live witnesses than those by videotape, and the
14 Olson case would present that opportunity to us.

15 So for those reasons, we think that Olson would
16 be a very good candidate for the next case. It's a label
17 that the Court is familiar with. The same issues are
18 there, and we do think that liability is truly still an
19 issue, and so we would offer up Olson as our choice.

20 THE COURT: What are your concerns about Straka?

21 MS. VAN STEENBURGH: The primary concern about
22 Straka is the fact that Dr. Baniriah is not here live to
23 testify, that we took her discovery deposition followed
24 five minutes later by her trial deposition, and that is
25 what we have.

1 And it is going to be one of these where you cut
2 and dice and splice her videotape, and it would be much
3 easier if we were to have the live testimony of
4 Dr. Baniriah. The other thing is, I think Olson is more
5 representative. If you're looking at injuries, we have a
6 single rupture versus a bilateral.

7 We went and tried to do a survey of what is out
8 there in terms of the injuries sustained by a lot of the
9 plaintiffs or what they're alleging. In Olson I think it's
10 like 340, it's in my letter, compared to the bilateral
11 rupture that Mr. Straka would have experienced, and so for
12 that reason, too, it might be more representative of what
13 is already in the pool.

14 THE COURT: Mr. Goldser?

15 MR. GOLDSER: Let me now be even more specific
16 about the Olson prescribing doctors. The first doctor that
17 Mr. Olson saw was Dr. Barrett at Fairview-Southdale in the
18 emergency room. Came in with a fever, unknown cause.
19 There was concern about whether it was pneumonia or whether
20 it was a urinary tract infection.

21 They didn't know, and as Ms. Van Steenburgh
22 correctly says, empiric therapy was prescribed. That was
23 Levaquin. I did not reread Dr. Barrett's deposition this
24 morning, but as we described in the letter, his testimony
25 about if you had known certain things, would you have

1 changed your prescription, and perhaps if we need more
2 detail, Mr. Fitzgerald can describe this, but he used the
3 word, his answer was equivocal.

4 We have not found Dr. Becker yet, although
5 Dr. Kirshbaum has now given us his whereabouts, and we can
6 take his deposition if we want to, but Barrett saw Olson in
7 the ER. Admitted him. Admitted him to Becker's care.
8 Becker then saw him for a day or two. Continued on the
9 empiric therapy. Narrowed the diagnosis down to a urinary
10 tract infection. Did not change the prescription at that
11 point in time, although he could have.

12 Then Dr. Kirshbaum saw Olson the last day in the
13 hospital and discharged him. Kirshbaum was deposed last
14 Friday. Kirshbaum said, yes, it was a urinary tract
15 infection. Yes, Cipro is perfectly appropriate for it, but
16 I'm not going to change a prescription midstream, and Olson
17 had no steroids. So we don't have the steroid issue in the
18 Olson case.

19 I said, Doc, if you knew as of the date you
20 discharged Mr. Olson that Levaquin had a greater degree of
21 tendon toxicity, would that have changed your mind to
22 prescribe Cipro instead of levo. He said, no, I would have
23 still prescribed Levaquin. Not a great answer for me. So
24 I kept pushing this. Don't ask a question to which you
25 don't know the answer.

1 Okay. Doc, if you knew that Levaquin had a
2 greater tendon toxicity than Cipro and you were consciously
3 aware that age was a separate increased risk factor per the
4 black box warning, would those two things in combination
5 have caused you to change your prescription? And he said,
6 no, I would have still prescribed Levaquin.

7 And there was a third factor that I added to that
8 mix, and now at the moment, I just can't recall what it
9 was. I said, if you knew A and B and C, would that have
10 caused you to change your prescription from Levaquin to
11 Cipro. He said, well, you know, the risk/benefit analysis
12 is closer, but I still have a problem because Mr. Olson
13 wanted to get out of the hospital early. It wasn't against
14 medical advice, but still I knew he was combative, and I
15 was a little worried about his compliance.

16 Cipro is a twice-a-day. Levaquin is a
17 once-a-day. I still would have prescribed Levaquin. Now,
18 there may be some other ways I can get to a jury on the
19 causation question around that, and I think there are, but
20 with our experience with Christensen, we know full well
21 what a jury is likely to do with that.

22 If we want to pick a case that is likely to be a
23 defense verdict, bless our hearts. Let's go do it, and
24 that will be Olson. If we want to do something that has
25 more value overall, then let's pick Straka. I don't think

1 Olson does it.

2 THE COURT: Okay. Do you have anything else?

3 MR. SAUL: Your Honor, Lewis Saul. I just want
4 to be clear that we think that Johnson is also an
5 appropriate case. We don't agree with the defendants that
6 it's not an appropriate case. We just think that Straka is
7 more appropriate.

8 THE COURT: Thank you, Mr. Saul.

9 MS. VAN STEENBURGH: The only thing I would add,
10 Your Honor, is that it sounds like the plaintiffs don't
11 want to try the Olson case, and they want to try a case
12 where Dr. Baniriah has come back in hindsight after several
13 years and after talking with the plaintiff's attorney. So
14 we can argue all day as to what is appropriate from that
15 standpoint.

16 THE COURT: Okay. Thank you. I appreciate that.
17 I'll get this decision made quickly.

18 In terms of date, I developed a what might be a
19 slightly complicating factor in that I have a criminal case
20 involving two defendants accused of murder. It's an Indian
21 reservation case, which I had anticipated trying next week.

22 One of the defense lawyers developed a conflict
23 because one of the witnesses is a former client, and so we
24 needed a new defense lawyer. So we -- it looks like if the
25 case goes, which it sounds like it's going to because of

1 the significance of the penalties involved, we may have to
2 begin that on the 14th of November.

3 It is anticipated to be a five-day case. I think
4 I can probably wrap it up in one week. It was scheduled
5 for Fergus Falls, but we moved it here because both
6 defendants are in custody, and that small courthouse there
7 makes it difficult to have two defendants in custody.

8 So that, that pushes us off to the 21st of
9 November, which is the first part of Thanksgiving week, and
10 I have civil trials scheduled throughout here, but of
11 course this one is at the top of the list. Now we could
12 move it back in November, which would mean probably not
13 starting until the 28th and/or -- and that would get us, if
14 we were assuming three weeks, that would run us through the
15 16th of December.

16 I think there is probably only one day out of
17 there where I'm definitely unable to be here and in trial.
18 So that time is available, or we could look at January 3rd,
19 which is the Tuesday right after New Year's Day and start
20 then and kind of reserve as much time as we need. I have a
21 couple of days the second week of January where I have to
22 be at a conference, but otherwise, the schedule is pretty
23 clear.

24 So let's talk about what is preferred here, and
25 I'm particularly interested in everyone's schedules,

1 including anyone who is anticipated to be part of the trial
2 team.

3 MR. GOLDSER: As I think you know, Mr. Watts is
4 hoping to be able to try this case, and because of his
5 commitments to the BP litigation in November and December,
6 he has asked us to put it off until January, although I
7 must be candid and say that if that case goes to trial, it
8 goes to trial at the end of the February, and he will be
9 involved in trial preparation throughout that time.

10 He thinks there is a chance that it will resolve,
11 and Mikal tends to be right when he says that but not
12 always.

13 THE COURT: When would it resolve is the
14 question, I guess.

15 MR. GOLDSER: In time to do a January trial.
16 That's what he has told me. So that reason by itself from
17 our perspective is one reason to postpone the trial until
18 January. I was certainly hoping to argue about the
19 November 14th date in particular because I have been called
20 for jury duty myself in Dakota County, but I guess that
21 issue has now become moot. I thought you might get a kick
22 out of that fact.

23 THE COURT: That's impressive.

24 MR. GOLDSER: Whether I will be on a jury or not,
25 that remains to be seen. Perhaps Ms. Van Steenburgh, who

1 lives in Dakota County as well, might be on that same
2 panel, and between the two of us, we could really fight it
3 out.

4 I do have a couple of other concerns. One is one
5 that I haven't mentioned before, and for want of a better
6 label, I will call it expert fatigue. The experts have
7 been going through the New Jersey trial now. They have
8 just been through our trial in June, and I have a concern
9 about having to call them yet again soon.

10 So from that perspective giving them a little bit
11 of a hiatus really helps. November to January might make a
12 big difference from their personal and academic schedules.
13 It might be very helpful.

14 We have mentioned that we have a new expert, a
15 human factors expert. Once we have the case selected, he
16 will be able to get his report done I expect within several
17 weeks, but we'll go through the usual counter expert
18 *Daubert* motions, depositions, and the like.

19 THE COURT: Is it possible that the New Jersey
20 trial won't wrap up until the end of October, do you think?

21 MR. GOLDSER: No. I think it will be done before
22 then because Ms. Jones has a vacation out of the country
23 that she is well intending to take, and speaking of that,
24 from my perspective, I also, as I think you know, am going
25 out of the country for ten days in mid to late October. So

1 a little extra time from my perspective is always nice.

2 We also have, we have some doctors' depositions
3 that we are going to need to take. We have an IME to take.
4 I'm hoping that only those necessary for the case that is
5 selected for trial will be taken before the trial and that
6 we put off any depositions of doctors in the cases that are
7 not selected.

8 That will relieve some of the pressure, but on
9 the other hand, in light of the Court's ruling the last
10 time about use of testimony from prior trials and our
11 desire to use some of the Seeger trial testimony and the
12 Fife trial testimony, unless the Court decides to do
13 something different, we're going to need to go take those
14 depositions again for trial.

15 Seeger is testifying via the same videotapes in
16 New Jersey. Dr. Fife, I believe, is going to be called
17 live. Whether we want to use Dr. Fife's videotape trial
18 testimony from New Jersey is a question that I posited a
19 little bit ago and may find an answer here soon.

20 But if not, we're certainly going to want to go
21 take his trial preservation deposition in this case and
22 again with an eye towards the future hopefully for all
23 future cases so that we can start putting this together in
24 a bundle that if we end up having a whole bunch of remand
25 cases, we don't have to fly these experts all over the

1 country. We have a trial package that we can give to local
2 trial lawyers, and they can try the case.

3 Now, I have slid into some of the other issues,
4 but bottom line is, there is a fair amount, depending on
5 some of the Court's rulings, that we're going to need to do
6 between now and trial. So even those extra few weeks from
7 the end of November to the beginning of January will be
8 very helpful.

9 THE COURT: Mr. Irwin?

10 MR. IRWIN: Thank you, Your Honor. We would
11 prefer to keep the November 14 trial date, but obviously,
12 we are respectful of the Court's obligations under the
13 Speedy Trial Act, and we're also respectful of counsel's
14 personal life and travel plans. Having said that, we would
15 like to keep the date if it's possible or if it's feasible.

16 If it's not feasible and we have to push it back,
17 either for the Court's obligations or for other reasons,
18 then we think January is far preferable, Judge, and the
19 reason we do -- and Tracy and Mr. Dames and I were talking
20 about this -- I suspect all of us on the defense side and
21 on the plaintiff's side would have significant problems
22 getting experts here and witnesses here during the
23 holidays.

24 It is really difficult, and that one month would
25 make a heck of a big difference and not cost us too much of

1 a delay. So for case management purposes and witness
2 planning purposes, we would very earnestly suggest that
3 January would be a more feasible schedule.

4 THE COURT: Is your schedule okay for January,
5 Mr. Irwin?

6 MR. IRWIN: Yes, sir, it is.

7 THE COURT: And everyone else?

8 MS. VAN STEENBURGH: (Moves head in affirmative
9 manner.)

10 MR. SAUL: Yes, Your Honor.

11 THE COURT: Okay. It seems that's probably best
12 given all the considerations. I'm quite sure the criminal
13 case is going to be tried, having had a couple of pretrial
14 conferences. I don't think there is a plea agreement. Of
15 course, it's always possible it settles at the last minute,
16 but that introduces uncertainty into whether we start,
17 which is a problem, too.

18 I don't -- if it does resolve itself, it's
19 probably not likely to until very close to trial. We have
20 a new lawyer trying to figure out defenses for one of the
21 defendants, and so the advantage of the January 3rd date is
22 that I can avoid any criminal case going on for that week
23 because I have time in December to clean up any criminal
24 cases that come along, so why don't we move it to Tuesday
25 the 3rd.

1 Monday the 2nd is open, but that, New Year's is
2 not a great travel day, and I think it's best to start on
3 the 3rd.

4 MR. IRWIN: May I speak to a couple of other
5 points that are relevant to this?

6 THE COURT: You may, Mr. Irwin.

7 MR. IRWIN: May it please the Court. We are also
8 working on the identification of a new generic expert, an
9 FDA expert. I wanted to inform the Court of that and
10 opposing counsel, and even with this new date, both sides
11 are going to have to work very promptly on the disclosure
12 of these experts, the production of their reports and
13 depositions.

14 So we think that we need to sit down with
15 Mr. Goldser very soon to work up dates along those lines,
16 and we will do that.

17 THE COURT: Okay.

18 MR. IRWIN: Another thing is this: We, assuming
19 we try one case in January, and it is our very strong
20 position, as Your Honor knows, that it only should be one
21 case.

22 THE COURT: Right.

23 MR. IRWIN: We will only be left then with two
24 cases in the trial. One is Sharon Johnson. We really
25 believe that Sharon Johnson is not much of value to us as a

1 bellwether case because of the 2002 date, primarily, and
2 then there is Mr. Olson. If Your Honor selects Straka, we
3 would be left with Mr. Olson, and there are serious motion
4 for summary judgment issues with Mr. Olson, and then there
5 is Straka. Whether we try Straka or not or one of the
6 other two, I don't know.

7 But the point is that we will be left with a very
8 small pool, and with this time that we have now, we think
9 it's very important that we embark on an effort to try to
10 develop the next group of candidates, and
11 Ms. Van Steenburgh and I have talked about that, along with
12 Mr. Dames, and we have some thoughts about that.

13 I may ask her to address that, if Your Honor is
14 interested in discussing it now, but we believe that's a
15 very important part of the next step.

16 THE COURT: I tend to agree with you on that,
17 Mr. Irwin. It seems to me, the question that I have is
18 what is an appropriate date by which we can identify kind
19 of the next group to choose from for trials if we're going
20 forward with more bellwether trials.

21 MR. IRWIN: We would hope -- we know Your Honor
22 is going to take that under advisement and give that
23 careful consideration. We would just echo Your Honor's
24 remarks that we would hope Your Honor could rule as soon as
25 possible so we know who that trial candidate is, because I

1 know that our FDA expert will be producing a report that is
2 generic but also specific to this particular trial.

3 THE COURT: Okay.

4 MR. IRWIN: And I know that Mr. Goldser has told
5 us that his prospective expert is also case specific in
6 part as well.

7 THE COURT: Okay. Thank you, Mr. Irwin.

8 MR. IRWIN: Thank you, Judge.

9 MR. GOLDSER: It sounds like Mr. Irwin pretty
10 much agrees with me on the evaluation of which case ought
11 to be tried next. If, as he says, there are serious
12 summary judgment issues in Olson, we may not get to trial.
13 This next case, as we have discussed now a number of times,
14 is in fact a bellwether case.

15 The question that Mr. Irwin's presentation raises
16 for me is whether the next trial after whichever case is
17 tried next, i.e. Straka, is a bellwether trial or just an
18 individual plaintiff's trial because we're going to try a
19 whole bunch of cases.

20 I venture to say that with the conclusion of the
21 next MDL bellwether trial and the conclusion of the pending
22 New Jersey trial that we should be done with bellwethers.
23 Bellwethers serve a particular purpose, and the question is
24 whether that purpose will have been fulfilled in order to
25 either create a record of rulings that can be fashioned

1 into an order for remands or for mediation.

2 We've had remand/mediation as the last item on
3 the agenda now for many status conferences. I think we're
4 done with bellwethers, and so to the extent that we're
5 going to continue trying cases, yes, we should certainly
6 start identifying cases for trial, but the purpose of those
7 later, that next round of trials is going to be vastly
8 different in my mind.

9 For example, rather than select a case that is
10 representative, as we have been arguing today, I think that
11 plaintiffs ought to choose a whole bunch of cases,
12 consolidate them so that we can get them done and
13 particularly for clients who are elderly, who like
14 Mr. Christensen could not appear in court if their case is
15 yet delayed much further.

16 We owe it to them that their cases need to be
17 heard and evaluated and tried, if we're going to try them.
18 Alternatively, as you know, I have held off making a formal
19 motion under Rule 16, I think it's 16.1, to establish a
20 mediation program with a magistrate judge or an outside
21 special master.

22 I haven't done that yet, but I venture to say
23 that that motion becomes very ripe at the end of the next
24 bellwether case. So I don't see the next case being tried
25 in this court as a bellwether. I see it as something

1 entirely different. That doesn't say we shouldn't start
2 identifying cases, but what matters is what pools are we
3 going to be looking from, and I don't think it's the
4 bellwether pool anymore.

5 MR. IRWIN: Your Honor, we don't have to try
6 every single one of these cases to get value out of this
7 process. There will be great value in discovering an
8 additional cohort of cases, and the discovery of those
9 cases will tell us many things, short of trying those
10 cases.

11 Some of the things they would tell us are some of
12 the things that Mr. Goldser was talking about. What is the
13 value of the case? We can make judgments about the values
14 of the cases by understanding what the damages are,
15 understanding what the competing liability issues are.

16 So there is great value in the sheer process of
17 doing some focused discovery, and that is why we think we
18 get, if I can borrow a tired euphemism, it's sort of a
19 win/win thing. We can prepare a set of cases for
20 bellwether trials or any other trials that you want to call
21 them and at the same time learn and profit from the
22 discovery that we do and not overdo it.

23 We're not talking about discovery of cases of a
24 thousand plaintiffs. We're talking about 10, 12, 15
25 perhaps.

1 MR. GOLDSER: I'll get on that road any day. In
2 fact, I will expand it because if at the end of the day
3 we're going to try and mediate a whole bunch of cases, the
4 defense is going to want to have that precise kind of
5 information. Now, that doesn't mean you take ten
6 depositions in each case.

7 What it does mean is that you start fashioning
8 the information that you want to know about those cases,
9 and you start getting questionnaires or records or what
10 have you or statements from all the plaintiffs' lawyers who
11 have cases either in state court or federal court or both
12 so that we can all begin to evaluate and put values on them
13 for whatever purpose we have in mind.

14 We can do that, and we, frankly, I think we ought
15 to focus on doing that. Now, I don't know that we have the
16 time to do that between now and the next trial, but right
17 after that next trial, if they want to start evaluating
18 cases, sure, there are lots of ways of evaluating cases.

19 If we want to do things like summary jury trials,
20 to do them that way, we could do that. If we wanted to
21 take another ten, perhaps, and do some more depositions, I
22 suppose we could do that, but I don't know that we're going
23 to learn a lot by taking more depositions. We have deposed
24 a ton of prescribing doctors already.

25 What more can we learn about how prescribing

1 doctors reacted generally? What we need to know is how did
2 this doctor react in this case? Those are the kinds of
3 things that we are going to need to know as we go forward.

4 So I think Mr. Irwin is right. I think there is
5 a bigger picture to be had with that after this next trial.

6 MR. SAUL: Your Honor, Lewis Saul. May I speak?

7 THE COURT: Go ahead, sir.

8 MR. SAUL: After the January trial, my
9 understanding is New Jersey will have a trial, so we will
10 have five trials at that time. Mr. Goldser and I discussed
11 how to best go forward, and as he pointed out to the Court,
12 we think that it should be by age and by date of filing,
13 and if you combine those two, it's totally objective.

14 There won't be any arguments about what case will
15 go next, and we go from there, because as the Court knows,
16 of my cases, I've lost eight plaintiffs already, and, you
17 know, it's an aging population. So we think that might be
18 the best approach.

19 THE COURT: Are there additional trials planned
20 in New Jersey at this point or not?

21 MR. SAUL: Not as of yet, but the, I believe that
22 the Court indicated that they would, you know, that she
23 would keep trying cases, and New Jersey plaintiffs' counsel
24 have indicated that they're going to ask for a large
25 consolidated group of cases for the next trial.

1 THE COURT: Okay. Ms. Van Steenburgh?

2 MS. VAN STEENBURGH: I haven't -- I don't know if
3 I've really thought this all through, but I'm not sure we
4 are done with bellwethers, and one of the things I think we
5 have been trying to do is to figure out what common factors
6 there are and what representative issues that we have, and
7 we have tried a case involving bronchitis. We've tried a
8 case involving pneumonia.

9 We have tried a case with a label in one year and
10 a label in another year. In New Jersey, the labels are
11 2007 or 2008, so we may get something from that. I do
12 think that, and I have to disagree with Mr. Goldser, I
13 don't think it is that we're at the end of the bellwether
14 yet because I'm not sure that we have isolated what are
15 those representative kinds of facts that could be applied
16 to a lot of the other cases.

17 And we have gone through now and tried to figure
18 out what are the common injuries, what are the common
19 indications. From the information that we have, we can't
20 necessarily always do that, but those are the kinds of
21 things I think are supposed to be distilled down in a
22 bellwether case to get some sense as to what you're going
23 to get from a jury depending on certain facts.

24 So I would make the case that maybe we're not
25 quite done with bellwethers.

1 THE COURT: Okay. Anyone else on these matters?
2 We had -- let's see. I'll make the decision shortly on the
3 identification of the additional trial. I tend to agree
4 that we still exist in bellwether land at this point in
5 time.

6 When we end that process, it's still a little bit
7 unclear. I would like to see what happens in New Jersey
8 and what we learn from the case there, and I think it's a
9 subject that we will likely be discussing once we finish
10 the next trial, whether we have more to glean from
11 additional trials or not at this stage and time.

12 Okay. Anything about discovery coming up? I
13 recognize it's slightly different depending on which of the
14 plaintiffs are chosen.

15 MR. GOLDSER: And you're right, and I think we
16 will need to fashion a schedule, and I agree that we need
17 to sit down and do that schedule. The one thing I do want
18 to address is the idea of supplemental plaintiff
19 depositions. I believe those are for the purpose of
20 updating plaintiff's medical condition and how the injury
21 has affected them.

22 You know, I think that can be handled a couple of
23 different ways. One is with a directed interrogatory, but
24 even more appropriately, the defense has asked for,
25 formally asked for independent medical exams. It's on the

1 list. My hunch is at this point you will grant them in the
2 amount of time that remains before trial, and finding out
3 how plaintiffs are doing is exactly what goes on in an
4 independent medical exam.

5 To make the plaintiff show up twice for a
6 deposition and an IME is a little bit burdensome. So I
7 think they can get what they need from an IME without
8 having to force the plaintiffs to sit down and take another
9 deposition.

10 THE COURT: I think the individuals we're talking
11 about here are all available to testify at trial, correct?

12 MR. GOLDSER: Yeah. Well, Mr. Olson is, although
13 he has had a stroke, but I believe so. Ms. Johnson
14 certainly is, last I knew, and the same is true of
15 Mr. Straka.

16 MS. VAN STEENBURGH: The only thing I would say,
17 Your Honor, is with respect to Mr. Straka, there is an
18 issue with him. He supplemented his PFS with a document.
19 I believe it's something from his pharmacy that we were not
20 provided when we took his deposition the first time around,
21 and so it's prescription information. It's information
22 that he may have read.

23 He was asked about it. Didn't have it. I would
24 suggest that this is not appropriate for some kind of
25 examination at trial, but we certainly would want to be

1 able to talk to him about a document that he has produced
2 after his deposition was taken, so I think it might be
3 slightly different.

4 Admittedly, Ms. Johnson has since had shoulder
5 surgery. We would like to ask about that as well, and I
6 believe that Mr. Olson has had other orthopedic issues, but
7 to the extent those are medical conditions, that may be
8 less of a concern, but this is truly a concern that we
9 would have with Mr. Straka.

10 THE COURT: Do you know anything about this
11 document, Mr. Goldser?

12 MR. GOLDSER: I don't. My guess is that either
13 Mr. Saul or Mr. Fitzgerald do, and I don't know if they're
14 prepared to speak to it at the moment. If they are, great.
15 If not, that might be something that we can discuss and
16 raise if in fact Mr. Straka is chosen as the bellwether
17 case.

18 MR. FITZGERALD: Your Honor, this is Kevin
19 Fitzgerald. Ron trailed off, so I didn't hear the end of
20 what he said. My understanding was that the pharmacy
21 sheet, that had actually been provided with the original
22 plaintiff fact sheet in the Straka case. I may be mistaken
23 there, but that is my recollection.

24 MR. IRWIN: Judge, this is Jim Irwin. I looked
25 at this pretty carefully. If you look at the original

1 plaintiff fact sheet, which was furnished to the defendant
2 before Mr. Straka's deposition, it had on it a prescription
3 record from Walgreen's. It did not have on it the warning
4 language. It did not have the advisory language that you
5 often see on pharmacy bags.

6 When the PFS was supplemented just recently and
7 about a year after the deposition, we then get, we get the
8 complete pharmacy record that includes the warning language
9 that specifically mentions tendon. So by no means am I
10 suggesting that this, that there is anything improper here.

11 By no means am I suggesting that, but I am
12 suggesting that that is a critical piece of evidence that
13 has come out since the plaintiff's deposition was taken.

14 THE COURT: Well, I think that both sides need to
15 discuss this matter, if Straka is the case that is chosen,
16 and decide how to handle it. It sounds like something that
17 probably needs some additional examination, maybe a fairly
18 limited one.

19 Okay. Anything else we need to talk about today,
20 Ms. Van Steenburgh?

21 MS. VAN STEENBURGH: One other thing, Your Honor,
22 that we have on here, the defense employee personnel files,
23 which is an old agenda item. We have reviewed the
24 personnel files for the witnesses that Mr. Goldser had
25 identified.

1 There is nothing in either Dr. Yee's file or
2 Dr. Noel. There are a few documents in Dr. Kahn's file
3 that we would like to submit in camera and have the Court
4 make a judgment as to whether those should be produced or
5 not.

6 THE COURT: Okay. Very well.

7 MR. GOLDSER: And Dr. Fife?

8 MS. VAN STEENBURGH: We didn't talk about
9 Dr. Fife that I was aware of. You said only live
10 witnesses, and he wasn't here live.

11 MR. GOLDSER: If we end up deposing -- let me get
12 to the microphone so people can hear. If we end up taking
13 a trial preservation deposition of Dr. Fife, we would want
14 to have his personnel file as well.

15 MS. VAN STEENBURGH: I'll talk to Mr. Goldser
16 about that.

17 THE COURT: Okay. That's fine. Okay. Anything
18 else for today?

19 Mr. Goldser?

20 MR. GOLDSER: No, I don't think so, Your Honor.
21 Thank you.

22 THE COURT: Okay. Very well. I will issue an
23 order in the next day or so on the trial issue so we get
24 that taken care of. We will set the trial date for January
25 3rd, 9:00 a.m., and of course, do you want to set a date

1 for motions in limine submissions? What do you think if we
2 have a January 3rd date? What would be reasonable?

3 MS. VAN STEENBURGH: You're causing us to
4 calculate in our heads.

5 THE COURT: You know, if we set it for January
6 3rd, you can make a joint proposal on the dates of
7 submission.

8 MS. VAN STEENBURGH: That's fine.

9 MR. GOLDSER: We will meet and confer with Holly.

10 THE COURT: Okay. Sounds good. Okay. Anything
11 else for today?

12 MS. VAN STEENBURGH: No.

13 THE COURT: Okay. Thank you all again, and we
14 will be in recess, and we should probably set another time
15 to gather in case there are issues that come up, probably
16 mid-October sometime, if that works.

17 MR. GOLDSER: I am out of the country from
18 October 11th through the 23rd, I believe is the date.

19 THE COURT: Okay. We could do the 25th or the
20 26th, unless you think we should have one beforehand which
21 we would probably have to do the week of the 3rd then,
22 which might be a little bit soon, but maybe not.

23 Ms. Van Steenburgh, what are your thoughts on
24 that?

25 MS. VAN STEENBURGH: I'm trying to anticipate

1 what might be coming up. We have some depositions coming
2 up, and they will be done pretty much by the end of
3 September. I guess it's going to depend on what your
4 decision is on the case.

5 THE COURT: Why don't we set a time on the 25th,
6 and we can add a time during the week of the 3rd if the
7 parties wish to do it, either in person or by telephone.
8 Okay? 25th, how about 1:30 on that date?

9 MR. GOLDSER: Works for me.

10 MS. VAN STEENBURGH: Yes.

11 MR. IRWIN: Yes.

12 THE COURT: Okay. 1:30 in the afternoon on
13 October the 25th, and as soon as you know whether you would
14 like to have an in-person or telephone conference the week
15 of the 3rd, let Holly know. We can take time either on the
16 4th or the 5th and do it one of those two days.

17 MS. VAN STEENBURGH: Okay.

18 THE COURT: Okay?

19 MR. GOLDSER: Very well.

20 THE COURT: Okay. Thank you. We will be in
21 recess.

22 Oh, before we go, just let me introduce Laura
23 Arneson, who is one of my new law clerks and has drawn the
24 assignment of working on this case, so you will see her.

25 MR. GOLDSER: We had that privilege last time we

1 were here.

2 THE COURT: Yeah. Okay. Thank you.

3 MS VAN STEENBURGH: Thank you.

4 THE CLERK: All rise.

5 * * *

6 I, Kristine Mousseau, certify that the foregoing
7 is a correct transcript from the record of proceedings in
8 the above-entitled matter.

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12 Certified by: s/ Kristine Mousseau, CRR-RPR
13 Kristine Mousseau, CRR-RPR

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